Donald Lawan v Mong ak Dagang and third party

HIGH COURT (KUCHING) — ELECTION PETITION NO 26–01 OF 1996–I (SG)
IAN CHIN J
3 MARCH 1998

Election *— Offences — Allegation of bribery — Finding that there was sufficient evidence that bribery had taken place — Judge caused certificate under s 36 of Election Offences Act 1954 to be issued — Whether court was functus officio when making conclusive finding of guilt against respondents when it handed down judgment and issued certificate — Whether hearing must be conducted before certificate was issued — Whether s 37 contravenes Federal Constitution that person cannot be condemned first and heard later*

On 13 February 1997, after a trial of the election petition, the judge delivered a judgment that implicated the respondents who were not parties to the election petition and made the decision to give them an opportunity to be heard as to why they should not be reported as provided for under s 37(2) of the Election Offences Act 1954 ('the Act'). The judge found that the evidence adduced by the petitioner in the election petition as sufficiently establishing beyond reasonable doubt that bribery had taken place and caused a certificate under s 36 of the Act to be issued. The respondents raised certain preliminary objections, ie: (i) the court was functus officio because the court had already made a conclusive finding of guilt against the respondents when it handed down the judgment and issued the certificate; (ii) the structure and ingredients of ss 36 and 37 of the Act are such that the hearing to be accorded to the respondents must be conducted before the certificate was issued; (iii) s 37 of the Act contravenes the Federal Constitution — a person cannot be condemned first and then heard later.

Held, dismissing the preliminary objections:

(1) The finding may be conclusive against the candidate who was the respondent in the election petition but it was not conclusive or binding against the respondents. It follows that the court could not be functus officio just because there was a conclusive finding against the respondent and not against all respondents. It was only a prima facie finding against the respondents and that was why the respondents were given the opportunity to be heard. Until the court has given an opportunity to the respondents to be heard and to give and call evidence to show why they should not be reported, the court could not be said to be functus officio (see p 611G–H).

(2) Section 37(1)(b) of the Act requires the names of the culprits to be mentioned which was not done in the certificate; thus, there was no strict compliance with s 37(1)(b). Therefore, it could not be a report that was envisaged by s 37. Furthermore, the certificate had made it clear when it referred to s 36 under which

the certificate was made. The certificate not only expressly stated that it was a certificate issued under s 3 but the non-mention of any of the respondents as being involved dispelled any doubt that the certificate was not a report under s 37. If that was a report under s 37, the names should have been mentioned and there would have been no need for any hearing. There was therefore no substance in the contention that the certificate, though purportedly issued under s 36, was also a report for the purpose of s 37 (see p 613B–E).

(3) The certificate and the report need not be made at the same time. The reliance placed on the Indian cases for the proposition that the certificate and the report must be made at the same time was misplaced because of the different provisions in the Indian Act (see p 614F–G).

(4) There is no violation of any constitutional provision in s 37 of the Act when it expressly provides for a person to be heard before he is condemned. In any event, there is no election court as such but an election judge who only has powers as provided under ss 35, 36 and 37 which do not include a power to make any declaration relating to the validity of any provisions of the Act (see p 615A–C).

[Bahasa Malaysia summary

Pada 13 Februari 1997, selepas perbicaraan petisyen pilihanraya, hakim tersebut telah memberikan penghakiman yang membabitkan responden-responden yang bukan merupakan pihak-pihak kepada petisyen pilihanraya dan membuat keputusan memberikan mereka peluang untuk didengar mengapa mereka tidak sepatutnya dilaporkan seperti yang diperuntukkan di bawah s 37(2) Akta Kesalahan Pilihanraya 1954 ('Akta tersebut'). Hakim mendapati bahawa keterangan yang dikemukakan oleh pempetisyen di dalam petisyen pilihanraya adalah mencukupi untuk menunjukkan sehingga tiada keraguan munasabah bahawa rasuah telah berlaku dan menyebabkan suatu sijil di bawah s 36 Akta tersebut dikeluarkan. Responden- responden telah membangkitkan beberapa bantahan awal: (i) mahkamah adalah functus officio kerana mahkamah telah pun membuat penemuan bersalah yang kukuh terhadap responden apabila menurunkan penghakiman dan juga mengeluarkan sijil tersebut; (ii) struktur dan ramuan ss 36 dan 37 Akta tersebut adalah bahawa perbicaraan yang diberikan kepada responden-responden mestilah dijalankan sebelum sijil dikeluarkan; (iii) s 37 Akta tersebut bercanggah dengan Perlembagaan Persekutuan — seseorang tidak boleh didapati bersalah dan kemudian didengar kemudian.

Diputuskan, menolak bantahan-bantahan awal:

(1) Penemuan bolehlah kukuh terhadap seorang calon yang merupakan responden di dalam petsiyen pilihanraya tetapi ia

A bukanlah konklusif atau mengikat responden-responden. Oleh itu, mahkamah tidak boleh functus officio semata-mata kerana terdapat penemuan kukuh terhadap responden dan bukan terhadap semua responden-responden. Ia hanyalah suatu penemuan prima facie terhadap responden-responden dan sebab itulah responden-responden diberi peluang untuk didengar. Sehingga mahkamah memberikan peluang untuk didengar kepada responden-responden dan juga memberi dan memanggil keterangan untuk menunjukkan mengapa mereka tidak sepatutnya dilaporkan, mahkamah tidak boleh dikatakan sebagai functus officio (lihat ms 613G–H).

C (2) Seksyen 37(1)(b) Akta tersebut memerlukan nama-nama semua pesalah dinyatakan tetapi ia tidak dinyatakan di dalam sijil tersebut; maka ini menjadikannya tidak mematuhi dengan ketat s 37(1)(b). Oleh itu, ia bukanlah laporan yang dibayangkan oleh s 37. Lebih-lebih lagi, sijil tersebut adalah jelas apabila ia merujuk kepada s 36 di bawah mana sijil tersebut dikeluarkan. Sijil tersebut bukan sahaja menyatakan bahawa ia adalah sekeping sijil yang telah dikeluarkan di bawah s 3, tetapi dengan tidak menyatakan responden-responden sebagai terlibat, telah menghilangkan keraguan bahawa sijil tersebut bukanlah laporan di bawah s 37. Jika ia adalah laporan di bawah s 37, nama-nama sepatutnya dinyatakan dan suatu perbicaraan tidak perlu diadakan. Tidak terdapat dasar untuk penegasan bahawa sijil tersebut, walaupun ia dimaksudkan dikeluarkan di bawah s 36, adalah juga laporan bagi tujuan s 37 (lihat ms 613B—E).

F (3) Sijil dan juga laporan tersebut tidak perlu dibuat pada masa yang sama. Pergantungan terhadap kes-kes India untuk cadangan bahawa sijil dan juga laporan mestilah dibuat pada masa yang sama adalah tidak benar oleh kerana terdapat peruntukan-peruntukan yang berbeza di dalam Akta India tersebut (lihat ms 614F–G).

(4) Tidak terdapat pelanggaran peruntukan Perlembagaan di dalam peruntukan s 37 Akta tersebut apabila ia memperuntukan secara nyata bagi seseorang didengar sebelum beliau disabitkan. Juga, tidak terdapat mahkamah pilihanraya tetapi hakim pilihanraya yang hanya mempunyai kuasa di bawah ss 35, 36 dan 37 yang tidak termasuk kuasa untuk membuat deklarasi mengenai kesahan mana-mana peruntukan di dalam Akta tersebut (lihat ms 615A–C).]

I **Notes**

For cases on election offences, see 6 *Mallal's Digest* (4th ed, 1997 Reissue) paras 1517–1519.

Cases referred to

Merlimau Pegoh Ltd v Collector of Land Revenue Jasin [1969] 2 MLJ 248 (refd)

Legislation referred to

Election Offences Act 1954 ss 36, 37
Indian Representation of the People Act 1951 ss 98, 99 [India]

Stanley Eddy (*Battenberg & Talma Advocates*) for the respondents.
Joseph Chioh for the State Attorney General.
Tun Abd Majid Tun Hamzah for the Federal Attorney General.
Baru Bian (*Baru Bian Advocates*), *Kilat Beriak* (*Chew, Jugah, Wan Ullok & Co Advocates*) and *Libat Langub* (*Dr Yaacob & Ismail Advocates*) for Mong ak Dagang.

Introduction

On 13 February 1997 after a trial of the election petition I delivered a judgment that implicated Paulus Anak Angoh, Gan Kiong Sing and Philimon Anak Nuing ('the respondents') who were not parties to the election petition and I made the decision of giving them an opportunity to be heard as to why they should not be reported as provided for under s 37(2) of the Election Offences Act 1954 ('the Act') which says:

> Before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an Election Judge under this section, the Election Judge shall give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

The respondents through their learned counsel, Mr Stanley Eddy, made certain preliminary objections against the conduct of the hearing against the respondents. I heard arguments on 11 and 12 November 1997 whence I adjourned to today for my ruling on those objections. A little of the background of the election petition had to be set out so as to place the arguments in their proper perspective.

The election petition was tried on 24, 25, 27, 28 and 29 January 1997. Evidence was led by the petitioner including calling two of the respondents, namely, Gan Kiong Sing and Philimon Anak Nuing while the other respondent Paulus Anak Angoh was identified by the witnesses in the course of the trial of the election petition. At the close of the case for the petitioner, the respondent (Mong Anak Dagang) elected not to call any evidence and submitted that a case had not been made out. I then adjourned the election petition to 13 February 1997 whence I gave judgment that the bribery charges were established beyond reasonable doubt.

In the course of my judgment, I referred to evidence adduced by the petitioner as sufficiently establishing beyond reasonable doubt that bribery had taken place and which evidence I had accepted in the absence

of any evidence, due to the fact that the respondent had elected not to call any evidence, to suggest otherwise. The relevant parts of my judgment which are referred to by learned counsel (in much lesser extent) are reproduced here:

> The 5 September bribery
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> The proof required in respect of the allegation of bribery in Lachau concerns a function held on 5 September in the area of Lachau which is within the N22 constituency where RM10 notes were alleged to have been distributed to the attendees who were registered voters. The key witness was Affendy Michael who took photographs of the events. These are his evidence.
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> Affendy Michael, the nephew of the petitioner, testified that on 5 September he went to a function held by the BN for the respondent. When he saw money was being distributed to the attendees while urging them to vote for the BN, he went back to the petitioner's operation room and then returned to the function with a camera. He took 24 snaps, with 18 printable, of the events at around 12 noon, including pictures of persons distributing money, of persons marking the palms and of persons receiving the money. He estimated that they were 2,000 people at the function which included ... Philimon Anak Nuing. A speech was made by someone followed by the distribution of money. ... It was while he was on his way to see the inspector that he saw Paulus Anak Angoh, one of the persons photographed by him distributing money. ... He testified that he also, like the other attendees of the function, queued up and received payment of RM20 firstly from the pilot Gan Kiong Sing ('Gan') who marked his palms but he washed the marks away and collected another RM20, that time from another distributor who asked him to vote the respondent. When cross-examined he said that it was wrong to have taken the money but he said since everyone else was taking he might as well take the money. He disagreed when put to him that there were only three persons as shown in the photographs distributing money and he maintained that many other persons also distributed money. ...
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> ... Another two persons, Deru Anak Maragan and Lumba Anak Tarong, who were photographed testified to the receipt of money after their palms were marked and they said that they were asked to vote the BN. Lumba Anak Tarong also testified, unchallenged, that a woman called Siah, a councillor and member of the BN, marked his palms. Deru Anak Maragam also testified that many other people were taking money.
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> Are those evidence, then, sufficient to establish the charge of bribery that was alleged to have taken place on 5 September at Lachau? Since it was not suggested that the photographs were fakes or doctored, I conclude that the pictures show the events that occurred at that time and the day they occurred was 5 September though the prints bear the date of 4 September which the Affendy Michael explained unchallenged and which I accept was due to a failure to correctly set the camera as regards the date. The pictures show two helicopters that had landed at Lachau and they were flown there by two pilots, Muhammad Arif Stephen bin Abdullah ('Arif') and Gan, where the function was held. Arif estimated about 1,000 persons being present and he had ... Gan said he was flying, which I will describe generally as, politicians in and out of the various areas falling within the N22 constituency, including Lachau. He identified himself in four photographs that were shown to him. In one photograph, Gan can be seen holding the finger of a woman while another hand of his was holding a marker pen and in the process of marking the finger

while two RM10 notes were in the course of being handed to the woman by another person. Similar scenes were repeated in another three photographs with Gan and the other person appearing in them and showing the marking of the hand by Gan and the giving out of money by the other person. This other persons can be seen in five photographs with a marker pen in his hand, with one showing him in the act of marking the hand while others show people holding RM10 notes while he was there ... .

The 6 September bribery

This takes me to the 6 September bribery. Radin Anak Tugang was and still is the headman of the longhouse called Rumah Engkramut in which lived some 100 voters. He testified that on 6 September, three persons, Philimon Nuing, George Garai and Anthony Belom, came calling and spent an hour there. According to him Philimon Nuing handed him RM5,580 in RM10 notes for distribution to about 30 residents who were then present and entitled to vote. They were asked to vote the BN and for that purpose each person was to be distributed RM30, half to be given immediately and the balance after the victory of the BN. If the BN should lose, the remaining money was to be given back. He said Douglas Kambing kept the balance of the money and that Douglas Kambing made a police report on 7 September. Douglas Kambing could not be traced to testify, however his police report says that on 6 September, at about 9pm, Philimon Nuing gave cash totalling RM2,790 for 'fishing' for the votes of the said longhouse and that the money was to be distributed if the BN wins. Albart Anak Kiang and Karin Anak Lucham both testified and supported the evidence of Radin Anak Tugang that there was distribution of RM30 per head leaving a balance to be paid if the BN candidate should win. All three of them went with Douglas Kambing to the police station where Douglas Kambing made the police report. The money was produced in court.

As against ... those evidence, the respondent elected not to adduce any and rested his case with the submission that the bribery charge had not been made out. ...

... As for the contention that the people who attended the function were mere sojourners, there is no evidence to suggest that these people were such. I cannot imagine money being distributed to people who cannot vote and thus the fact that they are voters mean they are not sojourners but residents of that area. As for the crowd having gathered spontaneously, it is of no consequence that the people had gathered there not by invitation. If it is meant to say that, because it was not spontaneous, it could not have been planned, the answer, then, is imply that it is highly improbable that any candidate would just chose a spot, set up his stall and thereafter bellow into a loudspeaker without first gathering the voters to hearken to him. In any event, Lumba Anak Tarong had testified unchallenged that many BN vehicles were urging people to go to the function and he went in one of those vehicles to go to the function. Clearly, then, the people were being urged to attend the function which was surely an invitation which points to a planned function. As for the lack of evidence regarding who organized the event, I agree that who particularly organized the event was not established but it cannot be disputed, by the fact of streamers bearing the symbols of the BN that were strung all over that area, that it was organized at least by the party of which the respondent's party is a component member.

... The next issue taken was the absence of evidence as to how many, other than those shown by the photographs, had given and how many had

taken bribes. But the photographs establish at least three persons were involved in distributing the money and surely you do not need three persons just to distribute money to another three persons. The photographs show the people to be seated in rows and that the three persons had been moving from person to person while in the process of distributing money and when you also consider the evidence of Affendy Michael that they were distributing money just about to everyone there, it leaves no doubt in my mind that every person who may be voters were the target of the distribution of money. The distribution of money, according to the eye-witness was to procure the votes for the BN candidate, the respondent, and it was so since it had not been suggested that it was anything else ... .

...Therefore, it is an inescapable conclusion that the money was to buy the votes of the voters. Given the estimate of at least a thousand people there, and that at least four persons were mentioned with the pictures showing at least three persons in that act of distributing the money or marking the hand for the purpose of the distribution of money, it also leaves no doubt in my mind that the target was to procure the votes of everyone present at that meeting. In the absence of evidence to the contrary, again it can reasonably and irresistibly inferred that the bribery was carried out in that function on a very large scale. ...

As for the 6 September bribery charge ... Every witness called in relation to this incident testified that Philimon Anak Nuing came with George Garai and Anthony Belom and gave money to Radin Anak Tugang and that the money was for the purpose of getting the people in the longhouse to vote the BN. Radin Anak Tugang said RM5,580 was given and half of the money after distribution was kept Douglas Anak Kambing. Karin Anak Lucham was very specific as to the distribution, which was RM30 then and the balance to be kept and later distributed if the BN should win. He was not cross-examined as to that assertion with the result that I will accept it as the truth at least unless there is contradictory evidence which there was none and more so in view of the fact that there was a report of that bribery and the surrendering of half of that money to the police, which the police report confirmed ...

... I would say that there is still sufficient evidence to show beyond any reasonable doubt that Philimon Anak Nuing handed the money to Radin Anak Tugang for the purpose of buying the votes without relying on any testimony of Philimon Anak Nuing. Again, just as in the case of Gan, learned counsel did not question nor suggest to Philimon Anak Nuing that he did not give any money to bribe the voters though learned counsel cross-examined this witness but skirting this issue of whether he had in fact handed RM5,580 to Radin Anak Nuing; this again justify my conclusion that what was said by Radin Anak Nuing, Albart Anak kiang and Karin Anak Lucham, regarding the giving of the money by Philimon Anak Nuing and the purpose of that money, was anything but the truth. As for there being no mention of any request for voting for the respondent, we have evidence to say it was to vote for the BN and given the fact that the longhouse was in the constituency of N22, I am left with no doubt at all that the money was intended to secure votes for the respondent.

Finding

Therefore I am of the view that bribery within the meaning of s 10(e) and (f) of the Election Offences Act 1954 had been established. The bribery under s 10(e) was committed by: (1) Paulus Anak Nagoh; (2) Gan; and (3) Philimon Anak Nuing and under s 10(f) by (1) Affendi Michael; (2) Deru Anak

Maragan; (3) Lumba Anak Tarong; (4) Radin Anak Tugang; (5) Albart Anak Kiang and (6) Karin Anak Lucham. There were others whose names are unknown but shown in the photographs. There is, however, no evidence of any offence under s 10(g) relating to the receipt of money after an election. Though the exact number of voters who had been bribed could not be established nevertheless the evidence showed conclusively at the end of the case for the petitioner that Palus Anak Angoh, Gan and Philimon Nuing and others were actively involved in the giving of the bribes.

It was on the same day, that is 13 February 1997 that I caused the following certificate under s 36 of the Act to be issued, viz:

CERTIFICATE
(Section 36, Election Offences Act 1954)

The Petition herein dated 17 October 1996 was filed by Donald Lawan to have the election on 8 September 1996 of Mong Anak Dagang for the Sarawak State Constituency of N22 Bukit Begunan declared void and to have Mong Anak Dagang declared as not having been duly elected or returned on the ground that there was extensively prevalent general bribery that affected the election result and on the ground that Mong Anak Dagang had exceeded the statutory limit allowed for election expenses.

And the trial of the Petition having been had on 24, 25, 27, 28 and 29 January 1997.

And I, as the Election Judge, having on the 13 February 1997 delivered judgment and found

(1) that there was extensively prevalent general bribery amounting to a corrupt practice;

(2) that the election expenses of Mong Anak Dagang was not in excess of the statutory limit of RM30,000; and

(3) that Mong Anak Dagang and his election agent did not know and did not consent to the said corrupt practice.

I, Mr Justice Ian HC Chin, a Judge of the High Court in Sabah and Sarawak and the Election Judge, hereby certify that Mong Anak Dagang was not on September 8, 1996 dully elected or returned and that the election is therefore void.

Dated this 13th day of February 1997.

[Signed]
Mr Justice Ian HC Chin
Judge of the High Court in Sabah and Sarawak
Election Judge

I turn now to the issues raised by the preliminary objections.

Whether the court is functus officio

Mr Stanley submitted that the court had exhausted its jurisdiction over the election petition when it on 13 February 1997 handed down the said judgment and issued the said certificate because: (1) by the said date the court had already made a conclusive finding of guilt against the

respondents; and (2) the structure and ingredients of ss 36 and 37 of the Act are such that the hearing to be accorded to the respondents must be conducted before the certificate is issued.

As for point (1), Mr Stanley had cited Zamir on *The Declaratory Judgment* at p 282, which says:

> The general rule is that all persons who appear to have a real interest in objecting to the grant of the declaration should be made defendants. As Viscount Maugham said:
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> > 'The persons really interested were not before the court .... It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made'.

Even assuming that the statement of principle applies to an election petition, it is recognized by that authority that in very special circumstances all persons interested or indirectly prejudiced by a declaration need not be parties. The very special circumstances of this case are these. Firstly, s 37(2) of the Act expressly made provision for parties that are to be affected by the declaration but who were not parties or candidates to be heard, to be allowed to give and adduce evidence. By implication, that provision has the result of making whatever finding inconclusive against, and therefore, not binding against persons who were not made parties to the election petition. Secondly, since the respondents must have been fully aware of the proceedings in the election petition on account of the wide coverage by the news media which implicated them, they chose not to apply to join as parties. Thirdly, the respondent in the election petition had also not applied to have the respondents joined as parties and for the court to do so would surely be, looking at the perspective of the respondent, an unfair move since evidence may be elicited by cross-examination of the respondents which may be prejudicial to the respondent. Given those very special circumstances, I am of the view that the respondents should not have been made parties in the election petition. Therefore, though the finding may be conclusive against the candidate who was the respondent in the election petition, it is not conclusive or binding against the respondents. It follows that the court could not be functus officio just because there was conclusive finding in the election petition because that finding was only conclusive against the respondent and not against the respondents. It is only a prima facie finding against the respondents and that is why the respondents are given the opportunity to be heard.

As regards point (2), Mr Stanley had argued that the certificate, though stated to be issued under s 36 of the Act was also a report under s 37 of the Act. I have earlier already set out the certificate and it remains to be examined whether the certificate was issued under s 36 and also under s 37 of the Act. For this purpose the said two sections will be reproduced here:

36 Certificate of Judge as to validity of election

At the conclusion of the trial of an election petition the Election Judge shall determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination —

(a) to the Election Commission in the case of an election of a person to be a member of the Dewan Rakyat, a Legislative Assembly, the municipal council of the federal capital or of any other election that the Election Commission may be authorized to conduct; or

(b) in the case of any other election, to the State authority,

upon such certificate being given such determination shall be final; and the return shall be confirmed or altered, or the Election Commission or the State Authority (as the case may be) shall within one month of such determination give notice of election in the constituency or electoral ward concerned, as the case may require, in accordance with such certificate.

37 Report of Judge as to corrupt or illegal practice

(1) At the conclusion of the trial of an election petition the Election Judge shall also report in writing —

(a) to the Election Commission in the case of an election of a person to be a member of the Dewan Rakyat, a Legislative Assembly, the municipal council of the federal capital or of any other election that the Election Commission may be authorized to conduct; or

(b) in the case of any other election, to the State Authority —

(i) whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any; and

(ii) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice.

(2) Before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an Election Judge under this section, the Election Judge shall give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

(3) When an Election Judge reports that a corrupt or illegal practice has been committed by any person, that person shall be subject to the same incapacities as if at the date of the said report he had been convicted of that practice and a person shall be subject to the same incapacities if he was a candidate at the election and the Election Judge reports that such corrupt or illegal practice was committed with his knowledge and consent or by his agent.

(4) The Election Commission or the State Authority (as the case may be) shall cause a copy of such report to be published in the Gazette, and it shall be the duty of every registering officer forthwith to peruse the report and fortwith to delete from the register or list of electors assigned to him the name of every person appearing from the report to be incapable of voting at an election

A It will be recalled that the certificate made mention of the court's finding 'that there was extensively prevalent general bribery amounting a corrupt practice', that the election expenses did not exceed the statutory limit and that the candidate nor his election agent knew or consent to the corrupt practice. At first glance it would appear that that part of the certificate seems to take into account the requirement of s 37(1)(b)(i) of the Act since it made B mention of the existence of extensively prevalent general bribery, of expenditure limit not being exceeded and of the ignorance and lack of consent of the candidate or his agent of the corrupt practice, being matters required by s 37(1)(b)(i) of the Act. However, s 37(1)(b)(i) requires the name of the culprits to be mentioned which was not mentioned in the C certificate which is therefore not strictly in compliance with s 37(1)(b)(i). Therefore, it cannot be a report that is envisaged by s 37. Furthermore, the certificate made it clear when it referred to s 36 under which the certificate was made and the concluding part also made it clear that it was a certificate made under s 36 when it states:

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> I, Mr Justice Ian HC Chin, a judge of the High Court in Sabah and Sarawak and the Election Judge, hereby certify that Mong Anak Dagang was not on 8 September 1996 dully elected or returned and that the election is therefore void.

The certificate not only expressly states it is a certificate issued under s 36 but the non-mention of any of the respondents as being involved dispel any E doubt that the certificate is not a report under s 37. If that is a report under s 37, the names should have been mentioned and there would have been no need for any hearing. There is therefore no substance in the contention that the certificate though purportedly issued under s 36 is also a report for the purpose of s 37.

F It was then contended by Mr Stanley that the certificate and the report must be made simultaneously at the conclusion of the trial of the election petition because of the use in both ss 36 and 37 of the opening phrase — 'At the conclusion of the trial of an election petition...." In support of his argument, learned counsel referred to *Merlimau Pegoh Ltd v Collector of Land Revenue Jasin* [1969] 2 MLJ 248 which dealt with an objection to the use of G written submission in answer in response to an oral submission at a land reference and that case referred to various dictionary meaning as to the word 'trial', which, I am of the view, is of no relevance to the present case.

Mr Stanley then referred to the Indian provisions and submitted that they are the same as those under the Act. Learned counsel had referred to H ss 98 and 99 of the Indian Representation of the People Act 1951, which provide:

> 98 Decision of the High Court
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> At the conclusion of the trial of an election petition the High Court shall make an order —
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> I (a) dismissing the election petition; or
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> (b) declaring the election of all or any of the returned candidate to be void; or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.

99 Other orders to be made by the High Court

(1) At the time of making an order under section 98 the High Court shall also make an order —

(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording —

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of the corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of corrupt practice and the nature of that practice; and

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid;

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless —

(a) he has been given notice to appear before the High Court and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examination any witness who has already been examined by the High Court and has given evidence against him, of calling evidence in his defence and of being heard.

(2) In this section and section 100, the expression 'agent' has the same meaning as in section 123.

It should be obvious by comparing those Indian provisions with s 36 and 37 of the Act that while s 99 of the Indian Act makes provision for an order (as opposed to a report under s 37 of the Act) to be made at 'the time of making an order under section 98'. That provision stipulating the time in which the order must be made is absent from the Act. On that point alone, it cannot be said that the Indian provisions are the same as those of the Act. The certificate and the report need not be made at the same time. Therefore, in so far as reliance is placed on the Indian cases for the proposition that the certificate and the report must be made at the same time, I am of the view it is misplaced because of the different provisions governing the situation which I have already adverted to.

Until the court has given an opportunity to the respondents of being heard and of giving and calling evidence to show why they should not be reported, the court cannot be said to be functus officio. I turn now to the other and final preliminary objection.

Whether s 37 of the Act contravenes the Federal Constitution

As for this issue, Mr Stanley had referred to a host of authorities relating to the proposition of law that a person cannot be condemned first and then heard later. Mr Stanley had submitted that I have when I made the findings

against the respondent of the election petition I have already made conclusive findings against the respondents which submission I have already dealt with earlier. To repeat, the finding against the respondents were of a prima facie nature for which an opportunity must be given to the respondents to be heard and to give and call evidence. This I have attempted to do but for the preliminary objections. I do not see any violation of any constitutional provision in s 37 of the Act when it expressly provides for a person to be heard before he is condemned. In any event, as rightly pointed out by Mr Joseph Chioh Hock Hua, learned state counsel from the State Attorney-General Chambers, who appeared as amicus curiae, that there is no election court as such but an election judge who only have powers as provided under ss 35, 36 and 37 which do not include a power to make any declaration relating to the validity of any provisions of the Act.

Conclusion

I therefore dismiss the preliminary objections.

Preliminary objections dismissed.

Reported by Jafisah Jaafar